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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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LOCAL 8027 AFT-N.H.,  
AFL-CIO, ET AL

Plaintiffs,

v.

FRANK EDELBLUT, COMMISSIONER, N.H.  
DEPARTMENT OF EDUCATION, ET AL

Defendants.

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1:21-cv-1077-PB

February 15, 2023

4:00 p.m.

TRANSCRIPT OF STATUS CONFERENCE  
HELD VIA VIDEOCONFERENCE  
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Plaintiff:

Charles Moerdler, Esq.

David Kahne, Esq.

Strook, Strook & Lavan LLP

Gilles R. Bissonnette, Esq.

American Civil Liberties Union of NH

For the Defendant:

Samuel R.V. Garland, Esq.

NH Attorney General's Office

Also Present:

Peter J. Peronni, Esq.

Elizabeth Clark Milburn, Esq.

Morgan C. Nighan, Esq.

Esther Kane Dickinson, Esq.

Henry Klementowicz, Esq.

Jennifer A. Eber, Esq.

Suzanne Amy Spencer, Esq.

Nathan Reed Fennessy, Esq.

Court Reporter:

Liza W. Dubois, RMR, CRR

Official Court Reporter

U.S. District Court

55 Pleasant Street

Concord, New Hampshire 03301

(603) 225-1442

1 P R O C E E D I N G S

2 THE CLERK: Good afternoon, Judge.

3 We're here in the matter of Local 8027, et al vs.  
4 New Hampshire Department of Education, et al, for a preliminary  
5 pretrial conference, 21-cv-1077-PB.

6 THE COURT: All right. So I've read the submission.  
7 It seems like both parties believe that this case is resolvable  
8 on cross motions for summary judgment.

9 The plaintiffs would like expedited discovery. The  
10 defendant contends that while discovery isn't necessary, they  
11 agree that what discovery can be had should be expedited.

12 I'll start with each plaintiff, whichever one wants  
13 to go first. What -- what else would you like to tell me about  
14 how you'd like the case to proceed from here?

15 MR. MOERDLER: If I may, unless Mr. Bissonnette  
16 wishes to go first, Charles Moerdler, Strook, Strook & Lavan in  
17 New York for AFT.

18 Judge, I think I need to give you a little bit of  
19 additional background.

20 Over the course of the past few weeks, we have been  
21 trying to deal with the Attorney General's Office to see if we  
22 can find a way of resolving even more of this and having even  
23 less of a burden on both lawyers and the Court. Our thinking  
24 had been that your Honor's decision was clear as a bell,  
25 explicit, and it resolved, for all purposes, those things I

1 won, those things I lost; better stated, those things I won and  
2 Gilles lost.

3 THE COURT: I guess I have to admire your sense of  
4 self-confidence, sir.

5 MR. MOERDLER: I'm so sorry, Judge.

6 THE COURT: That's all right. I know you couldn't  
7 resist. Just go ahead.

8 MR. MOERDLER: You're absolutely right.

9 So the -- what we were thinking of doing was trying  
10 to do the following, or we had proposed it.

11 If we could reduce the findings that we thought the  
12 Court or the conclusions that the Court had reached into the  
13 form of a finding which was a final finding that could be a  
14 judgment and that -- in that event, we would then have a final  
15 order. Various portions, including my leave to amend, then  
16 going out the window, being dismissed and gone, and thereby be  
17 able if they wish to go up, as I understand they do, they would  
18 have a final order. We would then be able to dispense with  
19 discovery and go to the First Circuit, if that is their wish,  
20 on that basis.

21 Unfortunately, that didn't seem to work too well and  
22 the Attorney General's Office thought that it was more  
23 appropriate for them to have -- go another round and  
24 additionally to raise two what I call new but they're certainly  
25 different issues, one of which you specifically commented on in

1 the opinion.

2 (Technical difficulties.)

3 THE COURT: Did I lose counsel? I think I did.

4 Let's hope that he logs on again.

5 And maybe -- Mr. Bissonnette, maybe you can fill us  
6 in on your client's position while we're waiting.

7 MR. BISSONNETTE: Sure. Thank you, your Honor.

8 And I think the -- one of the common themes, I  
9 think, between kind of my side and AFT'S side represented by  
10 Attorney Moerdler is just the concern about any kind of further  
11 delay that would prevent us from getting to final judgment and  
12 final resolution.

13 And so Attorney Moerdler is correct that we've been  
14 having some discussions with the State to try to see if there  
15 was some sort of way, some sort of mechanism, to get to final  
16 judgment as quickly as possible, obviously with them reserving  
17 their appellate rights.

18 You know, because -- you know, I agree with Attorney  
19 Moerdler that it seems like your order was pretty close to  
20 final on a lot of these issues recognizing, of course, it was  
21 in the posture of a motion to dismiss, but it really wasn't  
22 clear to us that there was much left with respect to the  
23 analysis.

24 And so that did, as Attorney Moerdler said, led to  
25 multiple discussions. One was in the form of a potential

1 stipulation that would, you know, get this case to final  
2 judgment quickly, preserving appellate rights; the other was  
3 potentially the option, and this is mentioned in the discovery  
4 plan, of foregoing discovery, you know, with the -- with there  
5 being a preliminary injunction, agreed-upon preliminary  
6 injunction in place, that would serve to provide our clients  
7 with the protection that they're entitled to while briefing,  
8 summary judgment briefing, occurs.

9           So these are kind of various permutations that we've  
10 all discussed to try to get there.

11           Where Moerdler left off, and I know it's a little  
12 bit of a cliffhanger, we have -- in the purpose -- as we've  
13 been having these discussions with the State, it does seem that  
14 there are two other issues that the State, you know, may want  
15 to raise. I'll let Attorney Garland, you know, present those.  
16 But I think from where we stand --

17           THE COURT: I have to acknowledge I'm a little bit  
18 confused because when I read the filing, I thought it was you  
19 guys that wanted to do discovery and the State said it was a  
20 pure legal question --

21           MR. BISSONNETTE: Sure.

22           THE COURT: -- that didn't need discovery. Now I'm  
23 hearing you want to do it as a pure legal question and the  
24 State wants the chance to do discovery?

25           MR. BISSONNETTE: Yeah.

1 THE COURT: I --

2 MR. BISSONNETTE: Well, I think the concern that we  
3 have, I -- I see that. I think that one of the things that  
4 we're struggling with, all of us here, is, you know, discovery  
5 could be necessary. We certainly presented that at the  
6 hearing, right, the notion that even in the context of a facial  
7 claim there could be issues, important issues, that this Court  
8 may think need to be addressed in discovery germane to the  
9 facial claim; for example, complaints, how the relevant  
10 agencies interpret the law in question, the order of  
11 operations.

12 And so I think that certainly are germane, but, you  
13 know, there have been questions raised by the State as to  
14 whether or not that discovery is necessary for the facial  
15 claim. I think I'm very interested in your thoughts, your  
16 Honor, on that because we don't want to forgo something when  
17 your Honor may think it's critical to your analysis to reach  
18 final judgment. So I think that kind of, to some extent,  
19 explains, you know, the position that we took in the discovery  
20 plan.

21 I think where I am at at the end of the day  
22 representing my side is however your Honor wants to approach  
23 this case, you know, we're amenable, but we are very concerned  
24 about delay because --

25 THE COURT: Yeah. And I -- I understand that. Let

1 me offer a couple of comments and then I'll turn to Mr. Garland  
2 for his views about the additional issues.

3 I do want -- and you acknowledge this,  
4 Mr. Bissonnette. I was present with a Rule 12(b)(6) motion.  
5 The standard in a Rule 12(b)(6) motion, as we all know, is a  
6 plausibility standard. I cannot, in ruling on a 12(b)(6)  
7 motion, decide the case for the plaintiffs. I can only decide  
8 whether claims should be dismissed. And there were certain  
9 claims that were dismissed and the remaining claims were not  
10 dismissed.

11 Now, because of the complexity of the legal issues  
12 that you presented to me, I felt it would be helpful for this  
13 case going forward to give you a full-throated, carefully  
14 considered explanation of how I viewed the relevant law and I  
15 took the extra time to do that so that it would be my best  
16 effort to tell you how I think the law works in this particular  
17 case.

18 That does not mean that I've decided the case. I  
19 was not in a position to decide it and I'm sure those of you  
20 that undertook a close reading would find the word plausible or  
21 plausibly interspersed with a lot of my conclusions, first.

22 Second, I left certain issues open because they  
23 weren't reached by Mr. Garland, at least to my satisfaction.  
24 One of the principal issues was in resolving ATF (sic)  
25 plaintiff's First Amendment claim, I concluded that the

1 plaintiffs do not have a First Amendment right to control  
2 curricular speech. And so I found that claim to be deficient  
3 as to how it applied to curricular speech. I -- and that  
4 ruling has been made.

5 But I made clear that implicit in their argument,  
6 your -- the ATF plaintiff's argument, was an argument that even  
7 if there is not a First Amendment protected right on the part  
8 of teachers over curricular speech that the laws, arguably, I  
9 emphasize arguably, reached beyond curricular speech and dealt  
10 with let's call it extracurriculars such as the prayers that  
11 were recently decided were not curricular speech and were  
12 entitled to First Amendment protection in the recent Supreme  
13 Court decision.

14 Now, that issue, I -- ATF asserts that the law can  
15 be read broadly enough to encompass a wide range of  
16 extracurricular speech. Under *Garcetti*, government employees  
17 may retain certain First Amendment rights with respect to their  
18 speech even though they are government employees and I simply  
19 was trying to make clear on that issue, the issue has not been  
20 fully joined and I certainly can't dismiss the claim in its  
21 entirety.

22 So that's important to note as an example of the  
23 case where I said there is an issue here, the -- the  
24 defendants' briefing does not warrant complete dismissal of the  
25 claim and there may be a remnant of protection, but that



1 doesn't mean I know the outer boundaries of that remnant of  
2 protection. I -- it doesn't mean I've explained to you how I  
3 would resolve the issue if I determined that there was  
4 extracurricular speech that could potentially be encompassed by  
5 the rule because then I would not be doing an all-or-nothing  
6 *Garcetti* analysis; I would be doing a more nuanced balancing  
7 analysis that would have been required under pre-*Garcetti* case  
8 law.

9           So that's an example of an area where my order was  
10 not dispositive. And I -- I would -- while I have tried to be  
11 as clear as I possibly can about my views on the relevant law,  
12 and I recognize particularly with respect to the vagueness  
13 claim I have outlined my views about how a vagueness -- a  
14 facial vagueness challenge should be raised. I have identified  
15 various problems with the vagueness of the statute, but I  
16 haven't made a definitive ruling and nobody should count their  
17 chickens here. Okay?

18           As to -- and I'll turn now to Mr. Garland.

19           And, Mr. Garland, things seem to have flipped. It  
20 seems like you want discovery delay and they want an immediate  
21 ruling. Tell me about your thinking.

22           MR. GARLAND: I don't know if that's quite right,  
23 your Honor. Our position still, our default position, is that  
24 we can do additional briefing on the First Amendment issue you  
25 just identified. We've identified a few areas where I think we

1 feel we need to -- particularly given the posture in the  
2 briefing on the 12(b)(6) motion -- certainly need to preserve  
3 arguments with respect to vagueness, if not persuade you that  
4 the statute is not, in fact, vague.

5 And so we couldn't agree to a stipulation based on  
6 the framework of your order though we do very much appreciate,  
7 you know, the effort you put into it. It's very helpful to  
8 see, you know, the framework and your views on the law. That's  
9 been very useful for our analysis.

10 And so my default position is we can brief those  
11 remaining issues in cross motions now. I think they're legal  
12 issues. No discovery is necessary. But understanding that --  
13 you know, my understanding is the plaintiffs didn't agree to  
14 that, short of us agreeing to a PI, which I'm not authorized to  
15 do, or agreeing to a stipulation, which I'm not authorized to  
16 do, we tried to find some middle ground of compromise --

17 THE COURT: Let me stop you because I need to  
18 understand.

19 I get it, PI, to the extent they wanted a PI to  
20 leave in place while we do something, you aren't able to agree  
21 to that. I understand. I'm not sure what this stipulation  
22 that you both are talking about would entail. And what, if  
23 anything, can you tell me about this idea of a stipulation?

24 MR. GARLAND: Yeah, absolutely, your Honor.

25 So after your order came out, we -- we talked within

1 a few days, I think Attorney Moerdler and Attorney Bissonnette  
2 and myself, about, you know, what your order said and kind of  
3 the road map that we all saw from it and I think we all agreed  
4 that it was a very thorough order that gave us a lot of clarity  
5 on where you view -- view the case in terms of, you know, the  
6 legal analysis.

7 My proposal then was further briefing, just as I  
8 just suggested to you. The response that I got from -- to  
9 that, and understandably, was that the plaintiffs were  
10 resistant to that, but if we were willing to agree to some sort  
11 of stipulation of final judgment along the terms of your order  
12 that would end the district court matter, we would preserve our  
13 right to appeal, and that would be something that they would  
14 entertain. And I certainly -- I brought it back to my clients  
15 and it was not something we could agree to.

16 And so.

17 THE COURT: Are you saying a stipulation that given  
18 the Court's rulings that judgment should enter for the  
19 plaintiff but the defendant wants to preserve its rights to  
20 challenge on appeal? Is that your position?

21 MR. GARLAND: Exactly, your Honor. And we  
22 weren't --

23 THE COURT: That's the stipulation that was being --

24 MR. GARLAND: Yes.

25 THE COURT: Okay. And you couldn't do that is what

1 it comes down to.

2 MR. GARLAND: I think we -- there are issues that we  
3 need to at a very least preserve, if not -- if not, you know,  
4 kind of -- there's no --

5 THE COURT: Testify what those issues would be.

6 MR. GARLAND: Yes, your Honor.

7 So I think one issue that you've already identified  
8 is the scope of the -- kind of the application of this law to  
9 speech and whether that implicates extracurricular speech at  
10 all. And if it does, whether under the Pickering Connick  
11 standard it violates the Constitution. And so I think that  
12 issue is certainly still out there, it's not something that  
13 we've briefed, and we acknowledge that.

14 Another issue that I think we need to provide some  
15 clarification on, because your order pointed out, in your view,  
16 inconsistencies are what I said in court to you during the  
17 hearing versus what the Attorney General's opinion says.  
18 And -- and, you know, I've gone back and read the hearing  
19 transcript and I think I could have certainly been clearer on  
20 that with you at that time.

21 And so --

22 THE COURT: That's a nice way of saying that I got  
23 it wrong in describing your position; is that --

24 MR. GARLAND: I don't want to go so far as to say  
25 that, your Honor. Certainly not that.

1 But in terms of there being detention there, I think  
2 that's something that we've given additional thought to in  
3 light of your order and the way that certainly it's framed  
4 there.

5 And then I think also there's a question of  
6 severability. You correctly noted we never briefed that. I  
7 think there is an important question around that, particularly  
8 insofar as you've identified the penalties really being a  
9 significant factor in your -- in your analysis. And we think  
10 there's some briefing we could do around that.

11 There may well be --

12 THE COURT: There definitely could be a severability  
13 argument presented here because there is a -- as you well  
14 know -- a severability provision in the statute. And although  
15 Mr. Bissonnette tried to characterize his claim as an as  
16 applied claim as to teachers, what I really think it is is a  
17 facial challenge by teachers' groups about the way in which the  
18 statute affects teachers. And that was the focus of my  
19 analysis because that was the -- what the plaintiffs were  
20 presenting to me.

21 And it would not necessarily follow that the  
22 entire statute would fall root and branch even if it is a --  
23 my ultimate conclusion that the claims presented by teachers,  
24 that the claim can -- that the statute cannot be  
25 constitutionally applied to teachers because of the sanction

1 provisions which affect them in unique ways and leave them  
2 particularly vulnerable in ways that require greater notice to  
3 satisfy fair notice concepts.

4           And that was at the heart of my analysis about the  
5 way I think facial challenges work and about the way vagueness  
6 challenges work when there are aspects of the law that are  
7 particularly problematic in that they impose very, very serious  
8 career-ending sanctions on teachers. And it does not follow  
9 that every other provision in the statute, it applies much more  
10 broadly than teachers, and for which there are not comparable  
11 penalties.

12           And so I think that's something that definitely is  
13 the case and certainly I would fully understand if any  
14 stipulation you were being asked to enter into would be a  
15 stipulation only as to the vagueness of the statute as it  
16 applies to educators. And I use the term educators as that's  
17 the statutory term there which is broader than what we think of  
18 as just teachers but encompasses a variety of people that  
19 require certifications for their ability to practice their  
20 profession.

21           So I -- I understand your concern about that. I  
22 understand your desire to be able to weigh in on the Pickering  
23 Connick standard and how it might apply to speech by teachers  
24 outside of the classroom which really hasn't been addressed.  
25 But that's fine. Nobody can make you enter into a stipulation

1 or a preliminary injunction.

2 I understand -- I -- look. I -- I am sufficiently  
3 humble that I understand the reality of my situation. It is  
4 highly, highly likely that however this case is resolved at my  
5 level, it will be appealed. And it is highly, highly likely  
6 that the Court of Appeals will be the -- the final voice on  
7 this particular issue. And why not get it to them as soon as  
8 we possibly can. That -- that is a sensible thing.

9 But I can tell you, having sat with appellate panels  
10 many, many times, that's great, but an appellate panel doesn't  
11 want to issue a definitive case-resolving decision on less than  
12 a complete record. They would rather have me make sure that I  
13 develop a complete record before they have to weigh in on these  
14 issues.

15 And so I -- I think we have to be somewhat cautious  
16 on simply saying, oh, Barbadoro in the 12(b)(6) order told us  
17 clearly about what he thinks. Yeah, I've told you what I think  
18 about the way vagueness law works, for example, the way facial  
19 challenges to vague statutes work, and those are unresolved  
20 issues. They have not been authoritatively resolved by the  
21 First Circuit. So the First Circuit might well take a  
22 different view on that matter and if they do, it could end the  
23 litigation right there because this is a facial vagueness  
24 challenge.

25 So I understand the parties wanting to get it to the

1 Court of Appeals and I would be happy to have the Court of  
2 Appeals hear it. I just want to be sure I don't let the Court  
3 of Appeals down here and I develop a record that is sufficient  
4 so that that court will be comfortable in resolving those  
5 issues.

6 And so you asked me about, you know, are there  
7 things that could -- if I were an appellate judge, for example,  
8 reviewing a record in this case, one of the things I might want  
9 to know more about, for example, is exactly what kinds of  
10 extracurricular speech do teachers have with their students.

11 We had some discussion of that, but there's no  
12 evidence in the record about what kinds of extracurricular  
13 speech teachers actually have with their students.

14 It might be useful to know during the ensuing months  
15 since this case has been filed, have there been any complaints  
16 about violations of the statute by teachers or educators more  
17 broadly.

18 It could be valuable to know what -- whether there  
19 have been further expressions of opinion by implementers of  
20 the -- the statute between now and then.

21 If the parties -- but it is up to the parties to  
22 develop their cases, not me. I'm here to respond to what you  
23 do, not sit -- try to set up the case the way I would want it  
24 to be set up. But I do think that those are a couple of things  
25 the Court of Appeals, a judge on the Court of Appeals, might



1 want to know something about and I could see a question being  
2 asked, well, why shouldn't we just remand that to the trial  
3 judge here, let him develop a record. And that then delays the  
4 case by another year.

5 So you don't want to bring it up prematurely and  
6 then it takes -- because this -- these raise -- these are very  
7 important and complex and unresolved issues. I guarantee you  
8 the Court of Appeals will want to carefully consider these  
9 issues before it writes an opinion.

10 It will take many, many months. It'll be well over  
11 a year before the Court of Appeals likely responds on it. So  
12 the last thing you want is to push it up prematurely to the  
13 Court of Appeals, only to be told that it has to be -- certain  
14 issues have to be developed on remand and we're now three years  
15 into the process.

16 So I will not -- it's up to you to build the record  
17 that you both want to build. I'm here to help you do that.  
18 But those are a couple of thoughts that I have. And then --

19 MR. BISSONNETTE: Sure.

20 THE COURT: -- one thought that I almost always do,  
21 and there may just be nothing on this point, is I like to have  
22 a full indexed copy of the legislative history of a statute  
23 like this in the record. And it may be that my brief summary  
24 of that legislative history is all that there is and if that's  
25 so, fine. But if there were any statements on the floor, if

1     there were any statements in committee of which there's a  
2     record, it probably is worthwhile to collect and include it in  
3     the record --

4             MR. BISSONNETTE:   Yes.

5             THE COURT:   -- so that the Court of Appeals doesn't  
6     have to go hunting around in it -- for it if they think it is.

7             So those are, I guess, three things that -- three or  
8     four things that if I were an appellate judge potentially I  
9     might need to see something in the record about before I could  
10    finally resolve the matter.

11            So I -- I understand.   I don't fault the Attorney  
12    General for not agreeing to a stipulation.   I -- I don't fault  
13    the Attorney General for not agreeing to a PI.

14            It remains if the -- if the plaintiffs -- and I  
15    think the plaintiffs made absolutely the right choice in not  
16    seeking a PI initially because, again, I think Mr. Bissonnette  
17    has enough experience with me to know that I don't rush into  
18    making difficult decisions on the constitutionality of state  
19    statutes and I don't do that lightly and it would have taken me  
20    several months before I could feel comfortable giving you the  
21    analysis I gave here.

22            So I don't fault anybody here, but it -- if -- if  
23    you are unable to agree on either a stipulation or a -- the  
24    entry of a PI, the plaintiffs certainly could ask for a  
25    preliminary injunction.   Again, I would want to be sure that

1 the record was sufficiently developed so the Court of Appeals  
2 could finally resolve the case, but it might make more sense to  
3 simply do some limited expedited discovery on a targeted set of  
4 issues and have a schedule for cross motions, where both  
5 parties agree now the record is fully complete, we've had a  
6 chance to build our record, we're satisfied, we both believe  
7 the Court has everything it needs to resolve all issues in the  
8 case, and then I can take my crack at it and then you can go  
9 back -- go to the Court of Appeals.

10 MR. BISSONNETTE: Yup.

11 THE COURT: You know, so if after -- you know,  
12 unlike at the current stage, where I have only issued a ruling  
13 denying a motion to dismiss, if I conclude after a fully  
14 developed record that the plaintiffs are entitled to summary  
15 judgment, at that point I would either enter the preliminary --  
16 the permanent injunction or I would say to the State Attorney  
17 General's Office what I have said in the very few times I have  
18 ever held a state statute unconstitutional: Oh, by the way,  
19 I've given you this explanation, I don't expect you to be  
20 enforcing this thing against anybody while you're on appeal and  
21 if you're feeling otherwise, tell me, you know. Because  
22 normally state officials are presumed to follow rules of  
23 federal courts and -- rulings of federal courts and unless you  
24 ask for my permission to stay the effect of my order, I'd  
25 expect you to abide by it, you know.

1 MR. BISSONNETTE: Yeah.

2 THE COURT: So -- so that's where I am. I  
3 understand your positions now.

4 Counsel, I'm sorry we lost you for a minute, but you  
5 have an able colleague in Mr. Bissonnette who was able to, I  
6 believe, fully describe your position. You must have other AFT  
7 counsel here on the file -- or in the hearing. If you want any  
8 of them to speak or if you want to say anything else, go ahead,  
9 but where I am is this.

10 It sounds like the parties undertook reasonable  
11 efforts to get an expedited decision by way of the entry of a  
12 PI that could be appealed or a stipulation for judgment  
13 reserving the right to appeal. Those are both legitimate  
14 things to do for legitimate reasons. The Attorney General is  
15 not prepared to enter into a stipulation or agreed-upon PI and  
16 so we are then left with how do we proceed.

17 Mr. Garland acknowledges there are a couple of  
18 issues that he needs to do supplemental briefing on based on my  
19 order. Even if there were no facts in dispute, he'd need to do  
20 briefing on that. Mr. Bissonnette said, you know, we want a  
21 fast ruling, we want to get this thing moving, but, you know,  
22 if there are particular concerns the Court has, we would  
23 obviously want to listen to that. My response to that,  
24 paraphrasing again, is it's up to you guys to build the record  
25 that you want.

1 I don't -- that's not my role. But I tried to  
2 identify a handful of issues on which it might be helpful to a  
3 Court of Appeals judge reviewing this case and I -- I -- I  
4 think I identified what some -- some discovery or record  
5 stipulations could maybe do it about what teachers do in their  
6 interactions with students that could be characterized as  
7 extracurricular in a way that would entitle them to Pickering  
8 Connick First Amendment protection even if they have no First  
9 Amendment protection as to curricular speech.

10 Another issue that -- that I identified was it could  
11 be helpful to know what, if any, complaints have, in fact, been  
12 made between now -- the time of the statute's effectiveness and  
13 now that weren't provided to me and, finally, to the extent  
14 there have been enforcer interpretation in addition to what I  
15 had available to me, those would be potentially relevant to  
16 know.

17 And then the last thing I referenced was if there is  
18 any substantial legislative history that wasn't in front of me,  
19 I didn't go out and try to do it myself. The preferred way, at  
20 least for me, is for the parties to collect it, stipulate it,  
21 index it, Bates stamp it, and submit it as an exhibit so that  
22 no -- no other law clerk or Court of Appeals judge has to send  
23 somebody up to the New Hampshire Archives to try to dig out  
24 obscure legislative history.

25 Some judges think it's relevant. Some don't. I

1 have used it on occasion. I don't -- I'm cautious about using  
2 it. But generally when the constitutionality of a statute is  
3 challenged, I like to see the legislative history.

4 So in response to Mr. Bissonnette's question, those  
5 are some things that you might want to consider. But if you're  
6 just ready to file your motions and you agreed to file them,  
7 I'll rule on what I -- what you've given.

8 Okay? So, Mr. Bissonnette, do you want to follow up  
9 and then --

10 MR. BISSONNETTE: I do.

11 THE COURT: Okay. Go ahead.

12 MR. BISSONNETTE: I just want to say I think this  
13 has been really helpful for me just -- to learn just how to --  
14 how we as litigants in the parties here should interpret your  
15 order in this case. And what I was struggling with in reading  
16 this order is that, you know -- and obviously I saw all the  
17 Rule 12(b)(6) caveats, but, you know, one of the questions that  
18 was really presented in my brain is is this kind of an unusual  
19 case where maybe there were legal rulings kind of embedded  
20 within that 12(b)(6).

21 Clearly you made clear to us that I shouldn't over  
22 read that and I appreciate that very much. And I think, two,  
23 our discovery plan really was designed to reflect what we  
24 talked about at the inception of this case at the motion to  
25 dismiss argument which is if it was denied -- it was denied,

1 then we do expedited discovery and cross motions in the normal  
2 course but on an expedited basis, recognizing that at least in  
3 the plaintiff's view there is exigence here and harm the longer  
4 this law moves forward without some sort of relief.

5           So I just want to say that this has been very  
6 helpful to me, I'm sure to all of my colleagues here. We are  
7 prepared to move forward on an expedited basis as reflected in  
8 the discovery plan, a truncated 90-day discovery window with  
9 various discovery topics that we've specified in the discovery  
10 plan, much of which you've already covered during this status  
11 conference.

12           So I just -- I want to just be very clear we're  
13 ready to move forward. We're ready to move forward quickly.  
14 We're ready to move forward now on these limited issues. You  
15 know, because -- and we really do not want this to go beyond  
16 90 days. We're all going to have to work fast and quickly in  
17 order to get that brief -- get that -- those briefs on file.

18           I would say that I do believe the legislative  
19 history may already be part -- may have already been docketed.  
20 I'd have to go and check that. But on those --

21           THE COURT: I just wanted to be sure we had it --

22           MR. BISSONNETTE: Yeah, I'll agree. I'll check that  
23 again, your Honor. I don't want to misspeak.

24           But we're prepared to move forward along the lines  
25 that you've conveyed to us.

1           THE COURT: All right. So I -- I do think,  
2 Mr. Garland, so you have some legal issues that you want to be  
3 able to brief. We've talked about those. I think they're  
4 appropriate to raise in a -- in the cross motions for summary  
5 judgment practice. I -- I think if the discovery is narrow and  
6 focused and it will require some work on each side to get this  
7 record fully developed, there's a reasonable possibility that  
8 you can get the discovery done in this kind of expedited way.  
9 I would take, at most, a handful of depositions. A lot of it  
10 would be, you know, paper discovery. A lot of it -- and it  
11 is -- we're not talking hundreds of thousands of pages here.  
12 We're talking a very limited subset of pages.

13           But I'm thinking, for example, to the extent  
14 Mr. Bissonnette decides that it's important to have in the  
15 record how teachers interact with students on an  
16 extracurricular basis, he's got to come forward with some  
17 evidence on that particular point and you should be entitled to  
18 interrogate that evidence in order to make sure the issue is  
19 fairly represented.

20           And so I think a relatively small subset of  
21 depositions with lawyers working together -- Mr. Moerdler, one  
22 thing we did not -- we talked about while you were  
23 unfortunately offline was -- and I'm not sure, it looks like  
24 your screen's frozen, but if you're hearing me -- there's also  
25 a severance question here because at least my order was



1 targeted at the relief that the two groups of plaintiffs were  
2 seeking, which was really targeted at teachers who, in my view,  
3 are in the most vulnerable position as a result of this statute  
4 and who face unique problems that make the State's position far  
5 less tenable.

6 And so there's a reasonable likelihood here that I  
7 would do nothing more by way of final judgment than determine  
8 that any application of the statute -- that the provision --  
9 the only provision that I'm saying are unconstitutionally  
10 vague are those provisions that bear directly on what educators  
11 are -- how they affect educators and leaving potentially other  
12 for further development perhaps in other cases those provisions  
13 which have no bearing on educators.

14 So that -- unless the parties posture the case in a  
15 different way, there is a severability provision. I would be  
16 inclined to focus any ruling I make on those provisions which  
17 have been litigated in front of me and not on sweeping  
18 wholesale invalidation of the statute, even if I'm persuaded by  
19 the plaintiffs' position.

20 And, you know, I understand, Mr. Bissonnette, I -- I  
21 could have written a 15-page order that just would have denied  
22 in part and granted in part, but I felt that the legal issues  
23 are complex enough that as you go forward you ought to at least  
24 know my position so that you can, in the final set of briefing,  
25 stake out your reasoning why I'm right on this and wrong on

1 that and give me one last chance to correct any mistakes and  
2 then -- then the Court of Appeals can have it.

3           So that's why I did what I did. And I understand  
4 it. I mean, there -- on certain issues like how -- how should  
5 a vagueness challenge be viewed and what does fair notice  
6 require, and what do the kind of penalty provisions -- how do  
7 these provisions operate and what are the challenges they  
8 present when -- in the face of a vagueness challenge, those are  
9 my views. They're not likely to change because I spent a lot  
10 of time thinking about them. And other people -- other judges  
11 might have different views and the Court of Appeals might well  
12 correct me on those views. But I'm unlikely to change them  
13 between now and then unless you present me with some obvious  
14 legal analysis on a point that I've overlooked and I didn't  
15 think through.

16           So I think we're -- we've got a path going forward.  
17 It seems like that path involves this expedited discovery and I  
18 do think in the long run, Mr. Bissonnette, what your clients  
19 want is not just a quick ruling that gets -- that ends up with  
20 three years of delay; you want a ruling that can form a basis  
21 for a successful appellate challenge, as does Mr. Garland  
22 because both sides have an interest in having the final  
23 authoritative determination on the constitutionality of this  
24 statute, which we all know isn't going to come from me.

25           So let's -- let's do this. Let's get the expedited

1 discovery done. Let's follow the briefing schedule you've  
2 negotiated.

3 Mr. Moerdler, I'll give you a chance in just a  
4 second.

5 Let's get the cross motions for summary judgment  
6 filed.

7 The one thing, you know, I -- Mr. Garland served as  
8 a law clerk on this court. He knows well our law clerk  
9 changing schedule. I was -- I was saddened to see that you're  
10 proposing a schedule that doesn't let me decide the case until  
11 I have a turnover of law clerks because that means a very  
12 substantial reeducation campaign with some relatively new law  
13 school graduates. But, you know, I -- as valuable as my law  
14 clerks are on this, is my work, I fully know the law in this  
15 area, so I'll have to make the most of my experience and  
16 educate them quickly.

17 But, you know, again, it'll be a new crop of law  
18 clerks in September trying to struggle with whatever happens at  
19 oral argument. And it may take me a few months to get a final  
20 order out although I really hope that that order of mine is  
21 clear enough and is careful enough in a legal analysis that at  
22 least it sets forth my position that should enable all of us to  
23 do our work more efficiently, at least at this level.

24 So, Mr. Moerdler, I'm sorry. You were cut off and I  
25 just didn't want to wait until we got you back on. I hope

1     there's another representative of AT that was on the line that  
2     can brief you. In any event, I have a court reporter here and  
3     if you need a transcript, you can order one. But I think I've  
4     summarized what -- where we were on this.

5             But what else would you like to say, sir?

6             I'm sorry, I'm not hearing you now.

7             Who's local counsel for Mr. Moerdler?

8             MR. KAHNE: I can -- Chuck, it sounds like you might  
9     be muted.

10            This is David --

11            THE COURT: Yeah, you're muted. So let me turn to  
12     your cocounsel and just, sir, what would you like to say?

13            MR. KAHNE: Thank you, Judge. There's just one  
14     point I wanted to make and I think it's just sort of for  
15     clarification purposes.

16            The stipulation that we were contemplating, I think  
17     it did not -- it wasn't so expansive as to get into the area of  
18     the First Amendment. It was really supposed to be sort of  
19     narrowly focused on the facial -- and not even the as applied  
20     challenge, only the facial vagueness challenge. Because as you  
21     pointed out, I think your opinion in that area was particularly  
22     clear.

23            So -- but we fully understand your -- your point  
24     about you're developing an entire record as opposed to going  
25     up piecemeal, but I just wanted to make clear that the part of

1 the -- of the stipulation and that the expedition that we were  
2 seeking was just on that portion of the facial vagueness, to  
3 get that up to the First Circuit as quickly as possible.

4 THE COURT: And I get that, because that's the  
5 portion of my order which is the most definitive. It does turn  
6 largely on legal issues and facts that are either undisputed or  
7 language in the statute itself.

8 And you could do that, but, again, suppose you had a  
9 one judge on a three-judge panel that said, you know, I'm not  
10 sure that a facial vagueness challenge should be subject to --  
11 to review, but maybe there's a First Amendment claim here that  
12 is sufficient to justify a -- a more exacting vagueness review  
13 standard, but we can't answer that question.

14 So you never know what a panel on the Court of  
15 Appeals would be interested in knowing and since there is that  
16 issue hanging out there, if, for example, there -- you were to  
17 persuade me that there is First Amendment-protected speech that  
18 is affected by this statute, that would bolster your vagueness  
19 challenge because, as we know, First Amendment vagueness  
20 challenges are subject to a quite rigorous standard of review  
21 and it might give the -- the Court of Appeals an alternative  
22 path if the Court did not want to take up the issue that I took  
23 up about how *Johnson* affects facial vagueness challenges; they  
24 might want to focus on the First Amendment as an alternative  
25 route to getting to the same standard of review.

1           So you could -- so I -- I understand your concern,  
2     but the absolute worst thing we could have is a remand here.  
3     Okay? We need to get it done with me and so that the court  
4     that really will decide the case can decide it. And that's the  
5     quickest path to answering the question for both sides, which  
6     is so important.

7           So I think you just have to bear with us. The  
8     reality is federal courts, appropriately, are very deferential  
9     to state and federal legislative bodies. We don't lightly  
10    entertain constitutional challenges to state or federal  
11    legislation. There are only, really, two cases in 30 years  
12    where I've found a state statute unconstitutional.

13           In both cases, I was ultimately upheld. The -- one  
14    by Mr. Bissonnette in the First Circuit and one by the Supreme  
15    Court in the Vermont case that affirmed my decision after the  
16    First Circuit reversed me on it. But they're very important,  
17    serious challenges that you don't resolve lightly. And I have  
18    great respect for the New Hampshire Legislature and I'm going  
19    to carefully consider any constitutionality challenge to a  
20    state statute. It just takes time. It's too important to do  
21    it quickly.

22           So I'll get it done as fast as I can, but it's going  
23    to take a little bit of time.

24           I don't know, Mr. Moerdler. Are you back online?

25           Oh, no, sorry. I -- I'm sorry, Mr. Moerdler. We'll

1 just try to get you next time. And I -- you, fortunately, have  
2 a very good team of lawyers here who can speak for your client  
3 as well as for the coplaintiff.

4 So I think we've about covered it.

5 Mr. Bissonnette, anything more from you?

6 MR. BISSONNETTE: No, your Honor. Thank you.

7 THE COURT: Mr. Garland, anything from you?

8 MR. GARLAND: No. The only thing I want to flag,  
9 your Honor, is I think -- you're probably aware of it -- is the  
10 only real dispute in terms of the discovery plan that we've  
11 generally agreed to in our -- is with respect to the  
12 presumptive limits on the number of depositions, the number of  
13 interrogatories, et cetera.

14 So there -- I just want to flag there's a dispute  
15 there. I don't want to -- I don't need to advocate anything,  
16 but --

17 THE COURT: Here's what I would say. You guys have  
18 been good at working together. Meet and confer and try to  
19 reach reasonable agreements. If somebody thinks someone else  
20 is going too far -- we don't want to delay the case.  
21 Somebody -- if there's a dispute, the proponent of the  
22 deposition is going to have to make a strong case that -- and  
23 explain specifically what they could get from the deposition.

24 Otherwise, I wouldn't -- these are not just general  
25 fishing expedition kind of discovery here. We're going to move

1 quickly. And I'm confident that you will. We've got good  
2 lawyers all around on this case, so I think you can work  
3 through those things.

4           So I won't make any ruling on it now. We'll --  
5 we'll approve the plan as proposed, enter the deadlines that  
6 have been proposed. If you need to modify them, if you can  
7 agree, I'll agree to reasonable modifications. If you run into  
8 discovery disputes, I don't like to engage on those matters,  
9 but I will in this case. Just ask for a conference and I'll --  
10 I'll help you resolve it quickly.

11           I -- the parties I don't think have asked for this,  
12 but I -- I recognize that the briefing limitations are probably  
13 not sufficient here, so we ought to use a 50-page limit on  
14 briefs rather than our limit in the rule and a -- I -- I  
15 think -- I can't remember whether you envisioned this, but we  
16 could have a 50-page on the briefs and I'm going to set it for  
17 oral argument. I don't think we need reply and surreply briefs  
18 because we'll do oral argument. All right? So that will save  
19 us a couple of weeks while we wait for replies and surreplies.

20           So give you a good, full briefing opportunity for  
21 opening briefs and then we'll set oral argument and we should  
22 be able to get through the case like that. Okay?

23           MR. BISSONNETTE: Your Honor, I appreciate that. In  
24 the spirit of expediting this, I appreciate that. That's  
25 helpful. Thank you.



1 THE COURT: Anything else, Mr. Garland?

2 MR. GARLAND: Not at all. Thank you very much, your  
3 Honor.

4 THE COURT: Mr. Kahne, anything from the AT  
5 plaintiffs?

6 MR. KAHNE: No. Thank you, Judge.

7 THE COURT: Okay. Thanks, folks. I'll look for  
8 your -- for your briefs and let me know if you need anything  
9 before then.

10 MR. BISSONNETTE: Thank you, your Honor.

11 MR. GARLAND: Thank you.

12 THE COURT: Thank you. That concludes the hearing.

13 (Proceedings concluded at 4:50 p.m.)  
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C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that  
the foregoing transcript is a true and accurate transcription  
of the within proceedings, to the best of my knowledge, skill,  
ability and belief.

Submitted: 3/22/23

/s/ Liza W. Dubois  
LIZA W. DUBOIS, RMR, CRR